United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

JOHN B. RAUH,
Defendant in Error.

OCTOBER TERM, 1891.

No. 13.

PETITION FOR REHEARING.

W. C. BELCHER,
Attorney for Plaintiff in Error.

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To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The plaintiff in error respectfully petitions the Court to grant a rehearing in the above-entitled cause upon the following grounds:

I.

The Court ruled that it was bound by the statutes of the State of Oregon, and by the decisions of the Supreme Court of that State, as to the form and contents of the bill of exceptions, and as to the power of that court to review upon writ of error certain rulings of the Circuit Court of the District of Oregon.

The power of the courts of the United States to review by appeal or writ of error the decisions of other Federal Courts, and the methods of practice to be employed in conducting and perfecting such appeal or writ of error, and in preparing the case for such review, including the preparation of bills of exception, are matters regulated solely by the Constitution and laws of the United States;

and the State statutes and the practice of the State courts furnish no rule for such cases.

Re Chateaugay Iron Company, 128 U. S. 544;
Missouri P. R. Co. v. *C. & A. R. R. Co.*, 132 U. S. 191.

The case of *Ford* v. *Umatilla Co.*, 15 Oregon 313, cited by the Court, is therefore not in point. This Court is vested by the laws of the United States with the power to review the decision of the court below as to the matter in question, and should not decline to exercise that jurisdiction merely for the reason that the Supreme Court of Oregon refused to exercise it.

It has not been suggested that by the statutes of the United States, or by any rule of practice in any of the Federal Courts or under the practice at common law, a bill of exceptions need contain more of the evidence than is necessary to explain the points made; and we submit that, in the absence of any showing to the contrary, it must be presumed that the bill of exceptions in this case contains all that is necessary to enable this Court to consider the errors assigned. It has not been disputed that the questions propounded to various jurors, which the Court refused to permit to be answered, were proper questions, and that the Court, in order to enable it to exercise properly the discretion committed to it, should have permitted those questions to be answered. Until such examination should be had, it would be impossible for either party to interpose such a specific challenge as the decision of this Court requires; for only by the examination of the juror could the ground for such specifications be disclosed.

II.

In determining the question of the admissibility of the evidence objected to on the trial, the Court ruled that the case of *Pennsylvania Company* v. *Roy*, 102 U. S. 460, had no application to the case, because it did not appear that the testimony there held inadmissible had any legitimate bearing upon any issue in the case. In every action brought to recover damages for personal injury, the existence of the injury is necessarily in issue; and if the plaintiff is entitled in any case to introduce as part of his original proof, evidence of the condition of his family, on the ground that such evidence tends to corroborate testimony as to the existence of the alleged injury, then such evidence would be admissible in every

case. But the Supreme Court held in the case cited that it was not so admissible, and that case should therefore govern. When this evidence was offered there had been no suggestion that plaintiff was "shamming," nor was there any issue on that subject, beyond the issue necessarily tendered in every case.

III.

The Court held that there was some evidence upon which the jury might have based their verdict consistently with the instructions given by the Court. But the evidence pointed out in the opinion of the Court is not such evidence. It was shown that plaintiff was at the time of the trial sick and disabled, and that he had been so for some time; but no one of the witnesses, either for the plaintiff or for the defendant, testified that such sickness or disability was the result of the accident, nor were any facts disclosed from which the jury might legitimately infer that fact. It was essential for the plaintiff to show that his physical condition was due to injuries received through the negligence of the defendant; and unless the circumstances in proof were such that a person possessing only the ordinary knowledge of a juror could say that such condition was due to that cause, the plaintiff could not recover without testimony to that effect from expert witnesses. None of the expert witnesses testified that such was the case, and there were no circumstances in proof from which a person not possessing medical knowledge could determine that question. The medical witnesses for the plaintiff declared their inability to determine that question, and we therefore submit that the jury must necessarily have disregarded the instructions of the Court in finding such a verdict.

We respectfully refer the Court to our brief on file.

Respectfully submitted.

W. C. BELCHER,

For Plaintiff in Error.